IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-582

NORFOLK AND WESTERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, WALKER TOWING CORPORATION, HUFFMAN TOWING COMPANY, INLAND WATERWAYS, INC., FEDERAL BARGE LINES, INC. and INLAND TUGS CO.,
Appellants,

v.

THE HONORABLE WILLIAM L. BEATTY, VICTOR J. MOSELE, JOHN GITCHOFF, HAROLD R. CLARK, JOSEPH J. BARR, FRED P. SCHUMAN, MOSES W. HARRISON, II and JOHN D. LAURENTI, Judges.
Appellees.

On Appeal From the United States District Court for the Southern District of Illinois, Southern Division

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants' position on the merits is adequately set forth in the jurisdictional statement. This brief is submitted to clarify the questions presented, by replying to statements or omissions which, we believe, are misleading and appear to broaden the issues before this Court.

1. **Nature of Litigation and Legal Services.**

Appellees present a partial and, accordingly, inaccurate description of the nature of the litigation involved. They note:

> "At the inception of this litigation, appellants' attorneys were attorneys of record in at least eighty cases pending in Madison County, Illinois." (Motion to Dismiss, p. 4).

However, they fail to state that:

A. The eighty cases represent an accumulation of suits brought over a period of several years to enforce rights under federal statutes (F.E.L.A., Safety Appliance Acts, or Jones Act) or under admiralty law.

B. In every case, appellants' counsel represent the defendant and not the party who initiated the suit. The Madison County Circuit Court is a favored plaintiff's forum for F.E.L.A. and Jones Act cases (Jurisdictional Statement, page 13).

C. In every case, an Illinois licensed attorney has been employed as local counsel and appears at all stages of the proceeding.

In the same manner, the nature of the legal services performed by appellants' non-resident specialist counsel, at times, is referred to in broad terms. At the outset, appellees state:

> "Most, if not all, of the practice of law in Illinois by these attorneys has consisted of defending appellants in cases involving the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.) and the Jones Act (46 U.S.C. § 688)." (Motion to Dismiss, p. 4).

Appellees' argument (involving Illinois Supreme Court Rule 756 on the admission of attorneys to practice law) that appellants' counsel are engaged in the general practice of law in the state is not responsive to the issues raised in the jurisdictional statement. Appellants' non-resident specialist counsel do not engage in the general practice of law in Illinois, and do not seek to do so. Their practice in Illinois is limited to, and

consists solely of, legal services rendered in suits brought against their clients under the federal statutes referred to above. Illinois Supreme Court Rule 756 is not involved.

2. **Competence of Illinois Lawyers.**

From the beginning, appellees, as well as the state and county bar associations, have viewed this case as an attack on the general practice qualifications of Illinois lawyers. Predictably, their response has been two-fold: an insistence that Illinois lawyers are competent and that, in any event, one does not need to know much more than common law to be an admiralty or F.E.L.A. lawyer. Appellees state there is nothing "complex" or "esoteric" about defending F.E.L.A. or Jones Act cases:

> "Basically no more is involved in the cases pending against appellants in Madison County than the basic knowledge and application of ordinary legal concepts of negligence and contributory negligence." (Motion to Dismiss. p. 10).

The competence of Illinois lawyers is not an issue in this case. Illinois has a distinguished bar. However, a professional relationship should be initiated by the client, rather than the bar or the court, and is, in large part, based upon the trust and confidence of the client in his attorney. When a party successfully asserts the right to be represented by counsel of his choice, neither the claim nor the ruling in his favor disparages the state or local bar. The decisions of this Court—that a California defendant has a right to represent himself, if he wishes (*Faretta v. California*, 95 S. Ct. 2525 (1975), or that the State of Virginia cannot, under the Constitution, apply its statutes against champerty or solicitation to outlaw a union plan for regional attorneys to represent their member F.E.L.A.

claimants (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); (Jurisdictional Statement, p. 13)—constitute no reflection upon the qualifications of the California or Virginia bar. It goes without saying that the ruling of the Second Circuit—upholding the right of a California specialist anti-trust attorney to recover compensation for legal services rendered in New York, notwithstanding a New York statute making unlawful such activity without a New York license (*Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (1966), Jurisdictional Statement, p. 17)—does not represent a finding that there are no qualified anti-trust lawyers in New York.

Appellees' statement that "ordinary legal concepts of negligence and contributory negligence" apply in F.E.L.A. and Jones Act cases has not been true for over fifty years. Those concepts have been made inapplicable by statute (45 U.S.C. §53) and by the decisions of this Court (Jurisdictional Statement, pp. 11, 13). Moreover, unseaworthiness, which almost invariably is included as the second count in a plaintiff's complaint for damages under the Jones Act, is not based upon ordinary legal concepts of negligence and contributory negligence, but is based upon admiralty law.

No useful purpose would be served by a discussion of whether or not the branch of the law here involved, as to federal rights, is more or less complex or esoteric than labor or other branches of the law. That cases of this type involve special federal problems is emphasized by the fact that the Department of Justice has a separate Admiralty and Shipping Section; and admiralty law is one of the few specialties recognized by the American Bar Association (Code of Professional Responsibility, DR2-105). For the bar to keep pace with the needs of society, increased specialization is required.

3. **Power of State to Regulate.**

It is true, as appellees assert, that the State of Illinois "has a vital and compelling interest in maintaining high standards of ethics and competency among those who practice law within its borders" (Motion to Dismiss, p. 13). No one in this case suggests otherwise. However, it should be noted:

A. The record affirmatively indicates, and includes testimony by appellees, that the handling and trial of cases in Madison County by appellants' specialist counsel meet those standards.

B. Based upon Appellees' argument and a reading of Section 707, a non-resident lawyer trying his first case in Illinois would be allowed to do so, without local counsel, even though appellees have no knowledge of his competence or ethical practices.

Nevertheless, the power of a state to regulate the practice of law is limited by the Constitution, particularly by the Supremacy Clause (Article VI) and the Fourteenth Amendment. Illinois is part of a federal system. F.E.L.A. and Jones Act suits (of resident or non-resident plaintiffs, for accidents occurring anywhere in the United States) can be imported into the Madison County Circuit Court only because Congress, in creating the federal right, so provided.

It will not do for Appellees to assert that:

> "It seems obvious that the federal legislation has taken it for granted that suits brought under these federal statutes will be governed by the existing local federal and state rules . . ." (Motion to Dismiss, p. 9).

This statement, like appellees' comment that "ordinary concepts of negligence and contributory negligence" are applicable in F.E.L.A. and Jones Act cases (Motion to Dismiss, p. 10), can only be made by one who has not read—or prefers to ignore

—the decisions of this Court. (Jurisdictional Statement, pp. 10-12). Those decisions hold that a state lacks power to apply any of its rules—whether termed procedural or substantive—which affect or impair the federally created right. As the Court stated in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7:

> "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest, and . . . of course, lawyers accepting employment under this constutitionally protected plan have a like protection which the State cannot abridge."

Thus, the State of Illinois has a vital interest and substantial power to regulate fraudulent agreements and to bar stale claims; but this Court has held that it cannot apply its statute of frauds or statute of limitations or doctrines regarding the validity of releases to F.E.L.A. or Jones Act claims (*Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221 (1958); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); Jurisdictional Statement, p. 11). Illinois has a great interest and the power to regulate the rules of pleading and practice in its state courts; but it cannot apply those rules of pleading to impair the rights of an F.E.L.A. or Jones Act plaintiff (*Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949)). Appellees do not discuss, and make no effort to distinguish, these cases.

There is no merit to the assertion that, unless appellees' order is upheld, the power of a state to regulate the practice of law within the state "is meaningless" (Motion to Dismiss, p. 8). The power of the state to regulate, in connection with its statute of frauds or limitations or doctrines regarding releases has not been rendered meaningless because it cannot apply those rules to F.E.L.A. or Jones Act cases. The power of a state to

regulate the practice of law has not been rendered meaningless because this Court has required states to comply with the Constitution of the United States. (Jurisdictional Statement, pp. 12, 16) Large areas remain for proper state regulation.

The decisions of this Court leave no doubt that the right to the assistance of counsel is basic in our adversary system of justice. The classic statement by Justice Sutherland, in *Powell v. Alabama*, 287 U.S. 45, 69 (1932), repeatedly quoted with approval in later opinions, indicates why this is so. Even the intelligent and educated layman has little knowledge of the law and is unfamiliar with the rules of evidence. Without the guiding hand of counsel, in proceedings against him, even if his case is just, his adversary may prevail. The same reasoning is, of course, applicable to civil, as well as criminal cases; and Justice Sutherland expressly included civil cases in his statement that a refusal by a Court "in any case, civil or criminal . . . to hear a party by counsel employed by and appearing for him" would be a denial of due process in the constitutional sense (Jurisdictional Statement, p. 15).

Appellees are in error when they state:

> "The concept of 'counsel', as used in Powell, implies the requirement that an attorney be licensed to practice before the court where the case is being litigated". (Motion to Dismiss, p. 14).

The party may have no license to practice law and appear pro se (*Faretta v. California*, 95 S. Ct. 2525 (1975)); he may be represented by a specialist who is not a licensed attorney (*Sperry v. Florida, ex rel. The Florida Bar*, 373 U. S. 379 (1963)); or he may be represented by an attorney who has not been authorized to practice before the court involved (*U. S. v. Bergamo*, 154 F2d 31 (3rd Cir. 1946)); *Lefton v. City of Hattiesburg*, 333 F 2d 280 (5th Cir. 1964).

However, for purposes of this case, all that is required to support the position of appellants is the finding that the order issued by appellees—preventing appellants from having their F.E.L.A. and Jones Act cases tried by counsel of their choice—affects or impairs a federal right. Appellants submit that the *Kossick, McAllister, Garrett* and *Brown* cases cited above require such a result. If impairment of the federal right occurs when a state applies its rules of pleading, statute of frauds, statute of limitations, or doctrine regarding the validity of releases to F.E.L.A. or Jones Act claims, a much greater impairment would result if a court were "to refuse to hear a party by counsel employed and appearing for him," as appellees have done in this instance.

Although appellees attempt to distinguish the union cases cited by appellants, the fact is that this Court did refuse to permit the application of state laws forbidding solicitation and unauthorized practice of law to a labor union program of recommending F.E.L.A. attorneys to members and their families (Jurisdictional Statement, p. 16); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964). The plan, which received judicial sanction, involved an approved list of regional or out-of-state counsel for F.E.L.A. claimants and contemplated a regular—not an isolated program of representation. And the Court further held:

> "and, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the state cannot abridge" (377 U.S. 1, 8).

It is not unreasonable to assume that many of the union F.E.L.A. claimants, in fact, employ the union recommended lawyers and that these regional lawyers file and try F.E.L.A. cases in various states in their region in which they are not licensed. We do not

believe that a court would be permitted, in a case in which local counsel had been employed, to bar non-resident-specialist F.E.L.A. or Jones Act or admiralty counsel for a plaintiff from trying the case. With deference, we submit that, under our system, it can make no difference that appellees' order was directed against counsel for defendants, rather than counsel for plaintiffs. The impairment of rights is the same in both cases.

With reference to *Spanos v. Skouras Theatres Corp.*, 364 F 2d 161, cert. denied, 385 U.S. 987 (1966) (Jurisdictional Statement, p. 17), appellees attempt to distinguish the case on the ground that it involved only the application of contract law. However, the law is clear that a party cannot recover on an agreement which runs contrary to the strong public policy of the state in which suit is brought. Accordingly, in ruling for plaintiff, the court necessarily held that the state statute, condemning the unlicensed practice of law, could not be applied in connection with the federal rights involved in that case.

It is clear that the injunction sought by appellants should be granted, to prevent the State of Illinois from denying appellants the constitutional right to have counsel of their choice try the cases brought against them in the State of Illinois, wherein federally created rights are asserted against them, with Illinois licensed attorneys appearing as local counsel.

CONCLUSION

Basic constitutional rights of great importance are involved in this case. They require plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted

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